The Commonwealth of Massachusetts

DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY

D.T.E. 03-121 April 20, 2004

Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 136A and 137A - Boston Edison Company; M.D.T.E. Nos. 237C, 238C, 239C, 254A and 255A - Cambridge Electric Light Company; and M.D.T.E. Nos. 337A and 338A - Commonwealth Electric Company, filed on January 16, 2004, to become effective February 1, 2004, by Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company d/b/a NSTAR Electric.

HEARING OFFICER RULING ON
MOTION OF NSTAR ELECTRIC TO STRIKE FIRST SET OF INFORMATION REQUESTS OF CONSERVATION LAW FOUNDATION TO THE SOLAR ENERGY BUSINESS ASSOCIATION OF NEW ENGLAND

I. INTRODUCTION

On October 31, 2003, pursuant to G.L. c. 164, § 94 and 220 C.M.R. §§ 5.00 et seq., Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company ("Companies" or "NSTAR Electric") filed for approval by the Department of Telecommunications and Energy ("Department"), tariffs designed to establish standby rates for large and medium-sized commercial and industrial customers who have their own on-site, self-generation facilities. On November 26, 2003, the Department suspended the operation of the tariffs until June 1, 2004. On January 16, 2004, the Companies refiled the tariffs in this docket, thereby extending the period by which the Department could suspend the operation of the rates. On January 29, 2004, the Department suspended the operation of the tariffs until August 1, 2004, in order to investigate the propriety of the Companies' proposed tariffs.

On February 10, 2004, the Department conducted a public hearing and procedural conference. The Attorney General of the Commonwealth intervened pursuant to G.L. c. 12, § 11E. The Department granted full intervenor status to the following entities: Associated Industries of Massachusetts; the Boston Public Schools; Co-Energy America, Inc.; the Conservation Law Foundation, Inc. ("CLF"); the Division of Energy Resources; FuelCell Energy, Inc.; Fitchburg Gas and Electric Light Company; Low Income Weatherization and

Fuel Assistance Network and Mass Community Action Program Directors Association; Massachusetts Electric Company; National Association of Energy Service Companies, Inc.; the NE DG Coalition[1]; the Solar Energy Business Association of New England ; Siemens Building Technologies, District One; The Energy Consortium; UTC Power, LLC; Western Massachusetts Electric Company; the Western Massachusetts Industrial Customer Group. The Department also granted limited participant status to the following entities: Allied Utility Network, LLC; Constellation NewEnergy, Inc.; the E-Cubed Company, L.L.C.; Dgsolutions LLC; Energy Concepts Engineering, PC; Keyspan Energy Delivery New England; Pace Law School Energy Project; Plug Power, Inc.; Predicate, LLC; and Wyeth Pharmaceutical, Inc.[2]

At the procedural conference, the Hearing Officer established a procedural schedule that provided for, among other things, intervenors to file direct cases by March 16, 2004, and the close of discovery on intervenors' direct cases at March 23, 2004 (Tr. A at 89). By a Hearing Officer Ruling dated March 22, 2004, the close of discovery on intervenors' direct cases was extended to March 26, 2004.

On March 16, 2004, CLF joined in the filing of the following testimony: direct testimony of Thomas S. Michelman (with the Solar Energy Business Association of New England ("SEBANE")); direct testimony of David Hannus (with Co-Energy America, Inc. and the Joint Supporters), and the direct testimony of Mark B. Lively (with the Joint Supporters and the Division of Energy Resources). Also on March 16th, SEBANE filed the direct testimony of Andrew G. Greene. On March 22, 2004, CLF issued its first set of information requests to SEBANE pertaining only to Mr. Greene's testimony.

On March 23, 2004, NSTAR Electric filed a Motion to Strike First Set of Information Requests of Conservation Law Foundation to the Solar Energy Business Association of New England (the "Motion"). On March 26, 2004, CLF filed its opposition to the Motion ("CLF Response").

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1 The NE DG Coalition consists of the following companies: American DG, Inc.; Aegis Energy Services, Inc.; OfficePower L.L.C.; Equity Office Properties Trust, Inc.; Northern Power Systems, Inc.; RealEnergy, Inc.; Tecogen Inc.; and Turbosteam Corporation.

2 The following entities refer to themselves as the Joint Supporters: Allied Utility Network, LLC; the Boston Public Schools; Co-Energy America, Inc.; The E-Cubed Company, LLC; Dgsolutions, LLC; Energy Concepts Engineering, PC; National Association of Energy Service Companies, Inc.; Pace Law School Energy Project; Predicate LLC; and Siemens Building Technologies, District One.

II. THE MOTION

NSTAR Electric argues that CLF and SEBANE should not be permitted to supplement their own testimony by asking each other information requests through the discovery process (Motion at 1). NSTAR Electric asserts that "friendly" discovery should not be permitted to supplement pre-filed direct intervenor testimony through a second friendly intervenor (id. at 1-2). NSTAR Electric contends that the questions posed by CLF on the testimony of Mr. Greene are on topics not addressed in his pre-filed material (id. at 2). NSTAR Electric maintains that CLF's information requests to SEBANE are not truly discovery but they represent supplemental direct testimony, submitted after the deadline established by the procedural schedule (id.). NSTAR Electric asserts that if CLF and SEBANE wanted to address additional issues in their direct testimony, the procedural schedule allowed for this through jointly sponsored testimony filed on a timely basis (id.). NSTAR Electric argues that the Department should not allow the discovery and procedural process to be abused for the purpose of circumventing the procedural deadlines imposed in this case (id.).

III. RESPONSE TO THE MOTION

CLF opposes the Motion arguing that it is unsupported by the Department's rules and rules generally governing discovery during litigation of all sorts (CLF Response at 2). CLF maintains that, in overseeing discovery "the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 et seq. will guide the hearing officer" (id., citing Fiber Technologies, D.T.E. 01-70, at 35 (Interlocutory Order, December 24, 2002)). CLF asserts that the administration of Rule 26, and the parallel federal rule and its predecessors, highlight the broad and inclusive nature of contemporary discovery and the reluctance that all tribunals should show in striking, quashing or otherwise rejecting discovery requests (id., citing Strom v. American Honda Motor Co., 423 Mass. 330 (1996)).

CLF contends that the first three of its five information requests to SEBANE ask for clarification and explanatory analysis regarding the environmental implications fo the technology discussed in Mr. Greene's testimony and of the rate at issue in this proceeding (id.). CLF asserts that the information requested is a logical elaboration on Mr. Greene's testimony (id.). CLF maintains that a similar analysis was provided in the testimony of its witness, Mr. Michelman (sponsored jointly with SEBANE) (id. at 2-3). CLF contends that its fourth information to SEBANE seeks clarification of a technical detail uniquely within the knowledge of Mr. Greene, and, again, modeled on information requests provided in Mr. Michelman's testimony (id. at 3). CLF further contends that its fifth information request to SEBANE merely requests that Mr. Greene provide a rationale for a statement made in his testimony (id.).

CLF states that the Motion does not contest the relevance of the requested information to this proceeding (id.). CLF argues that a heavy burden should be placed on blocking

relevant information from discovery (id.). CLF further maintains that the Motion does not assert that its discovery of SEBANE would delay the proceeding or result in harm or prejudice to NSTAR Electric (id. at 3-4). CLF argues that the Department should reject the Motion because the objecting party is not the subject of the discovery request, there is no issue regarding the disclosure of confidential information, and there is no allegation that disclosure would cause harm to the objecting party (id. at 4).

IV. ANALYSIS AND RULING

The purpose of discovery in Department proceedings is to permit the parties and the Department "to gain access to all relevant information in an efficient and timely manner." 220 C.M.R. § 1.06(6)(c)(1); Fiber Technologies Networks, L.L.C., D.T.E. 01-70, at 35 (Interlocutory Order). As CLF has noted, in establishing discovery procedures, the hearing officer shall be guided by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 et seq. 220 C.M.R. § 1.06(6)(c)(2). Massachusetts Rules of Civil Procedure, Rule 26(b)(1) states, in part:

> Parties may obtain discovery regarding any matter, not priviliged, which is relevant to the subject matter involved in the pending action....It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence.

Department regulations and precedent as well as state and federal law place a heavy burden on a party to establish that relevant information should be blocked from discovery. Western Massachusetts Electric Company, D.P.U. 92-8C-A at 35 (Order on Appeal by Western Massachusetts Electric Company of Hearing Officer Ruling Granting Attorney General's Motion to Compel Discovery, June 25, 1993), citing 220 C.M.R. § 1.06(6)(c); Mass. R. Civ. P. 26(b)(1); Cronin v. Strayer, 392 Mass. 525 (1984); Babets v. Secretary of Human Services, 403 Mass. 230 (1988); Federal Trade Commission v. TRW, Inc., 628 F.2d 207 (D.C. Cir. 1980); and O'Connor v. Chrysler Corporation, 86 F.R.D. 211 (D. Mass. 1980). In its Motion, NSTAR Electric has not contested the relevance of CLF's information requests to SEBANE.

A review of CLF's information requests shows that they are relevant, within the meaning of Mass. R. Civ. P. 26(b)(1). Each of the five information requests refers to specific portions of Mr. Greene's testimony. The first and second information requests seek additional detail regarding the benefits of distributed generation. The third information request seeks an avoided emissions calculation from a model utilized by Mr. Greene. The fourth information request seeks further explanation regarding the system value of photovoltaic electricity. The fifth information request seeks a rationale for Mr. Greene's proposed exemptions from standby charges. Based on my review of these information requests, I find that they are reasonably

calculated to lead to the discovery of admissible evidence. In making this finding, I make no ruling on the admissibility of the responses to these information requests.

I further find that NSTAR Electric's contentions regarding "friendly" discovery and out-of-time supplemental testimony are insufficient to block relevant discovery here. Accordingly, the NSTAR Electric Motion to Strike First Set of Information Requests of Conservation Law Foundation to the Solar Energy Business Association of New England is Denied.

In consideration of the timing of this Ruling, SEBANE shall have three(3) days from the date of this Ruling to submit its responses to CLF's information requests.

Pursuant to 220 C.M.R. § 1.06(6)(d)3, any party may appeal this Ruling to the Commission by the filing of a written appeal no later than April 22, 2004, with any response to an appeal due no later than April 26, 2004.

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John Cope-Flanagan
Hearing Officer

Dated: April 20, 2004

cc: Commission
Mary Cottrell, Secretary
Andrew O. Kaplan, General Counsel
William Stevens, Jr., Hearing Officer